STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 26, 2005
v	No. 255211 Wayne Circuit Court
KEVIN TKACH, Defendant-Appellant.	LC No. 02-010633-01

Before: Saad, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from the opinion and order of the trial court finding that defendant had violated the terms of his probation and amending the order of probation to require him to serve 1 year of his probation in the county jail with no work release and no early release. We affirm.

I.

On October 30, 2002, defendant was found guilty of failing to pay child support, MCL 750.165, in a bench trial before Wayne Circuit Judge Vera Massey Jones. On November 18, 2002, the trial court sentenced defendant to five years' probation and ordered him to pay $24,790.88 in restitution, as well as other costs and fees, and, as further conditions, stated:

> Submit monthly report to the prob[ation] [department] regarding payment of child support. Failure will result in a violation of probation. [Defendant] must pay $120 in child support weekly.

On April 8, 2003, a contested probation revocation hearing was held before the trial court and the trial court found that defendant had violated the terms of his probation. On April 21, 2003, the trial court held a sentencing hearing and stated,

> As I said, I'm totally disgusted. I'm going to sentence the defendant to prison time unless I see within a week a substantial amount to the court.
>
> I'm going to sentence this man to serve two to four years with the Department of Corrections. I'll reconsider that sentence if I see $6,000 by two weeks from now. And that's for the restitution of the old payment.

Defendant's counsel responded that it would be nearly impossible for defendant to pay the $6,000 ordered by the court. The court responded,

> You know what? I'm not even going to get into that. They've tried – they've done a fraud on this Court with this whole thing, the money, and bouncing back and forth. Remarrying, leaving the state without permission of the Court. All of this. And then going to Las Vegas for a wedding, and not paying child support for his children.

On May 5, 2003, another sentencing hearing was held, wherein the trial court stated,

> And I found him in violation of probation because he had not submitted the month[ly] reports; and also, he had paid zero towards restitution, that is, the old restitution of $24,790.
>
> * * *
>
> So, here we are today because I had ordered him to make a substantial payment so that I could believe that he's really going to try and pay this off, and no money has been paid.

The trial court then ordered that the five years of probation be continued, but that defendant would have to spend one year in the county jail, "because he's not really making any kind of effort to make any payments." The trial court also stated that defendant would have "no work release" and that he was "not to get any early release." Finally, the trial court ordered defendant to continue making $120 per week in child support payments and further ordered that defendant pay $500 each month towards the amount of restitution previously ordered by the court.

On December 5, 2003, defendant filed a motion to disqualify Judge Jones and for resentencing. Defendant argued that Judge Jones was clearly biased against him and that her sentence after the probation revocation hearing, including her order that he be denied early release, evinced that bias. On December 12, 2003, the trial court heard defendant's motion to disqualify and denied it stating,

> You know, the only bias I got against him was what I learned in the courtroom. I learned how he had perpetrated fraud, upon fraud, upon fraud upon the Friend of the Court.
>
> He had no intention of paying for his children. He would do things like he'd have a job. He'd quit that job, then he would go work for his parents. Then he'd quit that job.
>
> * * *
>
> He is a perpetrator of fraud. He's been doing it – he'd rather go to prison than to pay for his children. He's had the ability to do so, and he has refused to do so.
>
> I'm going to deny your motion. You may, of course, go to the Chief Judge and ask the Chief to recuse me.

Thereafter, on the same day, defendant had a motion before Wayne Circuit Chief Judge Timothy M. Kenny, to recuse Judge Jones and be resentenced by a different judge. Judge Kenny denied the motion stating that, on the facts presented, he did not believe that Judge Jones was prejudiced or biased in fact and did not believe that Judge Jones would not follow the law. Judge Kenny declined to address the resentencing issue. On December 17, 2003, Judge Jones heard defendant's motion for resentencing. At the hearing, defendant requested an evidentiary hearing regarding the trial court's earlier order that defendant's 1-year jail term be without early release. Defendant explained that the Dickerson jail facility had interpreted that order to mean that defendant cannot earn 'good time' credits.[1] The court explained that its order was that defendant should not get early release and said that it did not believe that the order affected defendant's ability to obtain 'good time' credits. Defendant also argued that the record did not support a finding that he committed fraud on anyone or that the probation order from the original bench trial was clear. The trial court responded that it felt the original order was quite clear and that it believed the evidence showed that defendant simply tried to evade paying his support obligations. For these reasons, the trial court denied defendant's motion for resentencing.

This appeal followed.

II.

Defendant first contends that Judge Jones was biased against him and the order issued after the probation revocation hearing was tainted by that bias. For these reasons, defendant argues, he is entitled to resentencing by an impartial judge. We disagree. In reviewing a motion to disqualify a judge, this Court reviews the trial court's findings of fact for an abuse of discretion and the court's application of those facts to the relevant law de novo. *Olson v Olson*, 256 Mich App 619, 638; 671 NW2d 64 (2003).

A trial judge may be subject to disqualification if the "judge is personally biased or prejudiced for or against a party or attorney." MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). Disqualification is not warranted unless "the bias or prejudice is both personal and extrajudicial. Thus, the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding." *Id.* at 495-496. "Furthermore, the party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality." *Id.* at 497.

Defendant argues that the trial court's comments and the eventual disposition of the probation revocation hearing are evidence of the trial court's bias. We disagree. Hostile comments are ordinarily not supportive of finding bias. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Examining the record in its entirety, the comments directed at defendant by the trial court reflect the trial court's opinion that his behavior was willful and opprobrious. As the trial court noted, and the record reveals, this opinion formed as the result of the trial court's experiences with defendant during the original bench trial and subsequent probation revocation hearing. Likewise, the trial court's decision to amend the probation order was

[1] See MCL 51.282.

reasonably based on its experiences at trial and during the hearing.[2] "Where a judge forms opinions during the course of the trial process on the basis of facts introduced or events that occur during the proceedings, such opinions do not constitute bias or partiality unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *Id*. Based on this record, defendant has failed to demonstrate that the trial court had a deep-seated antagonism towards him. On the contrary, once the trial court found that defendant had violated the terms of his parole, it could have revoked his sentence and imposed a sentence of incarceration. MCL 771.4; MCR 6.445(G). However, rather than put defendant in prison for up to four years, see MCL 750.165(1), the trial court elected to modify the terms of defendant's probation. This is despite the fact that the trial court could have made such an amendment at any time, even without holding a probation revocation hearing and finding that defendant had violated the terms of his probation. MCL 771.2(2); *People v Brit*, 202 Mich App 714, 716; 509 NW2d 914 (1993) ("An order of probation may be amended ex parte, and there is no requirement that the defendant be given notice or an opportunity to be heard before the amendment."). Thus, although clearly aggravated by defendant's conduct, the record reveals that the trial court rationally assessed defendant's actions and determined that defendant was still a viable candidate for probation, albeit with modifications. Consequently, the trial court and chief judge did not err in finding no bias and defendant is not entitled to resentencing.

III.

Defendant next contends that the trial court erred when it determined that he violated the terms of his probation. We disagree.

Probation revocation hearings "shall be summary and informal and not subject to the rules of evidence or pleadings applicable in criminal trials." MCL 771.4; *People v Pillar*, 233 Mich App 267, 269; 590 NW2d 622 (1998) ("The scope of these proceedings is limited and the full panoply of constitutional rights applicable in a criminal trial do not attach."). At the revocation hearing, the prosecution bears the burden of demonstrating by a preponderance of the evidence that the defendant violated the probation order. MCR 6.445(E)(1). The revocation hearing is a two-step process where the trial court first must determine whether the probationer is in fact guilty of violating probation and then must determine whether the violation warrants revocation. *Pillar*, *supra* at 269. The trial court's findings of fact are reviewed for clear error, *People v McSwain*, 259 Mich App 654, 682-685; 676 NW2d 236 (2003), and the trial court's decision whether revocation is warranted is reviewed for an abuse of discretion. *People v Ritter*, 186 Mich App 701, 706; 464 NW2d 919 (1991).

At the revocation hearing, there was clear evidence from defendant's probation officer that defendant never supplied any proof that he had been paying child support, as required by the probation order. In addition, there was evidence that defendant never paid the full $120 per week in child support required by the order or any amount towards the restitution ordered by the court. Finally, the trial court clearly disbelieved the testimony and evidence presented by

[2] While the trial court did threaten to sentence defendant to a term of years in prison if defendant did not pay $6,000 in restitution within one day, the trial court never acted upon this threat.

defendant and this Court will not second-guess the fact-finder's credibility determinations. See *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Consequently, the trial court did not err when it found that defendant violated the probation order. Even if we were to rule otherwise, the trial court chose to continue defendant's probation with amendments, which it could have imposed even without the revocation hearing. MCL 771.2(2); *Brit*, *supra* at 716. Consequently, defendant cannot demonstrate that he suffered actual prejudice as the result of the trial court's findings. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

IV.

Finally, defendant contends that the trial court erred when it confined him to the county jail for a term of one year and ordered that this confinement not be subject to early release. Specifically, defendant argues that the trial court did not have authority to deprive him of his 'good time' credits under MCL 51.282(2). We agree that the trial court was without the authority to deprive defendant of his 'good time' credits under MCL 51.282(2), see *People v Cannon*, 206 Mich App 653; 522 NW2d 716 (1994), but we note that the trial court clarified that its order was not intended to deprive defendant of his 'good time' credits. Furthermore, defendant completed this sentence and was released in January of 2004. Therefore, the issue is moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski